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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BHUVANDEEP SINGH SETHI, Defendant and Appellant.	B286349 (Los Angeles County Super. Ct. No. KA114252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruben Garcia, Judge. Affirmed.

Jenny Macht Brandt, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Idan Ivri and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Bhuvandeep Singh Sethi (defendant) was on probation and subject to search conditions when, on two separate occasions, police officers discovered drugs and incriminating evidence during investigatory searches. Although the officers did not initially detain defendant for the purpose of conducting a probation search, defendant informed them during the course of both investigations that he was on probation. The trial court found defendant violated the terms of his probation—which prohibited him from possessing or selling narcotics—and executed a previously suspended seven-year, eight-month sentence. We consider defendant's contentions that police officers violated his Fourth Amendment rights in two respects: (1) prior to defendant's disclosure of his probation status, because the scope of the police investigation at that time exceeded constitutional limits, and (2) after defendant disclosed his probation status, because police were ignorant of the precise terms of defendant's search conditions.

I. BACKGROUND

A. Defendant's Conviction Resulting in Probation

In March 2017, pursuant to a negotiated plea, defendant pled no contest to possessing and transporting heroin and methamphetamine for sale (Health & Saf. Code, §§ 11351, 11352, subd. (a), 11378, 11379, subd. (a)). In accordance with the negotiated terms of the plea, the trial court sentenced defendant to seven years and eight months in jail. The court suspended execution of defendant's sentence on the condition that he complete three years of formal probation and serve the first 90 days of that time in county jail. The conditions of defendant's probation included a prohibition against using, possessing,

buying, or selling narcotics or associated paraphernalia without a valid prescription; a prohibition against associating with people defendant knew used or sold narcotics (unless he knew them through a treatment program); and a requirement that defendant submit his "person, residence, vehicle, electronic information and personal belongings to search or seizure at any time of the day or night, with or without probable cause, by any law enforcement officer or probation officer" including by "waiving all rights" under the Electronic Communications Privacy Act (Pen. Code, §§ 1546-1546.4).

B. Probation Violation Proceedings

1. New charges and allegations

Not long after entering his no contest plea, defendant was back in court on new charges. In mid-April, less than one month after being placed on probation, defendant was arrested and subsequently charged with two misdemeanor drug offenses—unlawful possession of heroin (Health & Saf. Code, § 11350) and possession of an injection or ingestion device (Health & Saf. Code, § 11364)—based on an incident where drugs and drug paraphernalia were found in a bag defendant's girlfriend carried as he accompanied her. At the end of May, defendant was again arrested after methamphetamine and drug paraphernalia were found in a car in which defendant was riding and incriminating text messages were found in defendant's phone. The People sought to revoke defendant's probation in lieu of prosecuting a new charge based on this second discovery of evidence of drug involvement in May.

The trial court permitted defendant to represent himself in the new proceedings, which were scheduled to be conducted in early October 2017.

2. Motions to suppress

At a status conference on September 20, 2017, before he received law library access, defendant stated he wished "to orally submit a motion to dismiss" the misdemeanor case (the April incident) "on grounds of illegal search and seizure . . . ." Defendant referred to *Mapp v. Ohio* (1961) 367 U.S. 643 and also stated he never received any *Miranda* advisement, referring to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and *Dickerson v. United States* (2000) 530 U.S. 428. Defendant also asked the court to dismiss the probation violation allegation arising from the May 2017 incident because there was "no basis for search and seizure or stop and frisk because no crime was committed[ ] and there was no probable cause of weapons or contraband being in [the] vehicle." Defendant asserted "[i]t should have been a routine traffic stop instead of [an] investigation," referring to *Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*).

The prosecution argued defendant could not move to suppress evidence pursuant to Penal Code section 1538.5 without first providing proper written notice.[1] The prosecution informed

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[1] Penal Code section 1538.5, subdivision (a)(1) permits a defendant to move to suppress evidence on the ground it was obtained through an "unreasonable" search or seizure. Motions under the statute are to "be made in writing and accompanied by a memorandum of points and authorities" that "list[s] the specific items of property or evidence sought to be returned or suppressed and . . . the factual basis and the legal authorities that

the trial court it would be prepared to contest defendant's motions on October 2—the scheduled hearing date—but only if it were "served with something, some kind of paper motion" because "that's what the law requires . . . ."

The court scheduled defendant to return to court in two days to address whether he had been given law library access. The court also asked the prosecutor how defendant might provide written notice, and the prosecutor responded: "He's given me oral notice now. If he wants to give me the written motions on the day—I assume he would do it through his investigator. I honestly don't know how it happens, but if he wants to get it to me through his investigator, that's fine. Or if he has it done by the 22nd, assuming he gets moved [to the jail area allowing library access] and has the ability to write them, I can take it on the 22nd." The court subsequently canceled defendant's next court date—at which point defendant still had not received law library access.

3. Adjudications

a. May incident

Hearings implicating both the April and May searches were held on October 2 and October 3, 2017. The trial court heard evidence concerning the May case (charging defendant with violating his probation conditions based on selling narcotics) first. Defendant stated he wished to exclude evidence recovered as a result of the search of the car, and the prosecution protested

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demonstrate why the motion should be granted." (Pen. Code, § 1538.5, subd. (a)(2).)

defendant had failed to provide written notice even after "[w]e gave him a special day just for that purpose."

Defendant said he had come to court on that day and was told the status conference was canceled—through no fault of his own. He said he had with him a written motion for the prosecution and had not provided it earlier through his investigator because he had had no direct contact with the investigator.[2]

The prosecution argued defendant's suppression argument was "a waste of the court's time" because defendant gave "up his right to" searches and seizures based on "reasonable suspicion and probable cause" when he accepted probation in lieu of jail time. Defendant responded his probation status was irrelevant because police had no reason to remove him from the vehicle following "a routine traffic stop" and police were unaware he was on probation "until [he] was taken out of the car."

The trial court deferred ruling on defendant's request to suppress evidence. The court confirmed defendant understood, however, that because this was a probation revocation hearing, it would not suppress evidence unless it found "the police conduct was so egregious as to shock the conscience . . . ."[3] Defendant agreed that was the correct standard.

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[2] Defendant said he lacked funds to make phone calls and his investigator would not accept collect calls. According to defendant, he could only communicate with the investigator through an ex-girlfriend in Arizona who would transmit messages from defendant to the investigator and vice versa.

[3] We address the application of this standard to probation revocation hearings *post*.

Three witnesses testified for the prosecution regarding the May 2017 vehicle search: the police officer who conducted the stop and search, a criminalist who tested evidence for narcotics, and a police investigator who provided expert testimony. Their testimony established the following facts.

On the afternoon of May 28, 2017, an anonymous caller reported to the Glendora Police Department that a man and woman were walking near Grand Avenue, the man was "carrying something in his hand that was concealed underneath a rag or t-shirt," and it looked "suspicious as if the subjects were casing the area." Officer Jonathan Drake drove to the area identified by the caller and saw defendant and another man, one Gutierrez, leave a Walgreens drugstore and get into a Mercedes with Gutierrez driving and defendant in the front passenger seat.

The prosecution asked Officer Drake whether defendant "matched the description that [the officer] got from the initial call" and Officer Drake answered yes, without elaboration. There was no testimony regarding how much time elapsed between the anonymous call and when Officer Drake arrived in defendant's vicinity.

Noticing Gutierrez's vehicle lacked a front license plate and had dark tint on the front windows—both Vehicle Code violations—Officer Drake conducted a traffic stop. The officer asked Gutierrez to step out of the vehicle and then asked the same of defendant, who at that point told the officer he was on probation.[4] Officer Drake searched Gutierrez, defendant, and the

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[4] The officer's request that Gutierrez and defendant exit the vehicle, and defendant's disclosure of his probation status, were not revealed during Officer Drake's testimony but rather beforehand, by defendant himself, when the parties were arguing

car, but the testimony was not clear on whether some or all of these searches took place before or after defendant informed the officer he was on probation.

Officer Drake found a bindle of what was confirmed to be methamphetamine "between the driver's seat and the driver's door."[5] The officer also found syringes, hypodermic needles, and "a rope that was tied off in [the] fashion of a tourniquet" in the vehicle.[6] Defendant and Gutierrez each had a phone in his pocket, and defendant also had "about $40 to $60 in five[-] and ten-dollar bills."

Officer Drake reviewed the contents of Gutierrez's and defendant's phones and found text messages transmitted between them. In a message sent that morning, a text from defendant to Gutierrez reads:[7] "If u need thst [*sic*] hit me up." Two hours

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whether he could move to suppress evidence from the vehicle stop. Even though defendant was not testifying under oath when he described the circumstances under which he disclosed he was on probation, his statement could be considered by the trier of fact (the trial court in this case) as an admission. (See, e.g., *People v. Garcia* (1864) 25 Cal. 531, 534-535 ["[a]n admission of a fact made at the trial in open Court by the prisoner or his counsel may be properly considered by the jury"].)

[5] The officer also found a bindle of what he believed was heroin, but the substance was never tested.

[6] No evidence was presented as to where in the vehicle these items were found.

[7] Defendant argued the evidence showed someone else could have been sending the incriminating texts to Gutierrez. Because there is substantial evidence the phone belonged to defendant

later—approximately 30 to 45 minutes before Gutierrez's car was pulled over—Gutierrez texted defendant to ask if he can "come through." Defendant responded, "we just got booted from[ ]the [Glendora Motel]" and told Gutierrez his location. Gutierrez responded he "need[ed] a 40 and a point"[8] and "can be there in 15." Defendant replied: "No points but I got you on the 40 . . . ."[9]

During his cross-examination of Office Drake, defendant asked why the officer "made Gutierrez exit the vehicle when it was just a routine traffic stop" and why the officer "turn[ed] [the stop] into an extensive investigation." The officer responded the traffic stop "was an investigative stop to follow up on th[e] report" that a passerby "suspected [defendant] and [his] female companion were casing the area to steal . . . ." Officer Drake acknowledged he found no drugs on defendant's person.

In his own defense, defendant testified he "jumped in[to] [Gutierrez's] car" after leaving Walgreens because he saw a Glendora Police Department vehicle and "figured [the officer] was going to mess with [him]" since defendant "always get[s] in trouble." The prosecution did not cross-examine defendant.

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and he sent the texts in question, we describe the texts as coming from defendant.

[8] A narcotics investigator testifying as an expert for the prosecution opined that "a 40" meant "$40 worth of narcotics" and "a point" probably referred to "hypodermic needles."

[9] Officer Drake also found earlier text messages between Gutierrez and defendant. In one exchange from April 2017, defendant asked Gutierrez: "You need any??" Gutierrez texted back a short while later: "I[']ll take a 40 again."

After evidence in the May 2017 case was presented, the trial court found "there was no police conduct that was so egregious as to shock the conscience" and stated it was "comfortable with its ruling not to proceed on any [Penal Code section] 1538.5 [motion] in that case." The court found defendant "violated his felony probation by committing the offense of possession [for] sale [of] heroin and methamphetamine." The court relied, in particular, on the text messages between defendant and Gutierrez, the drugs found in Gutierrez's car, and defendant's possession of "[$]40 to $60 in five to ten dollar denominations . . . ." The court further noted that even if the evidence had not shown defendant possessed the drugs that were recovered in the search or sold them to Gutierrez, the prosecution still proved defendant violated his probation because of the condition that defendant not associate with drug users.

b. April incident

When the parties turned to the earlier April 2017 incident, defendant again sought to exclude evidence in support of the People's case. The trial court stated that because the April matter was "an open case" (the People were pursuing a prosecution on substantive charges) and not merely "an in lieu of probation violation" proceeding, defendant was not precluded from filing a Penal Code section 1538.5 motion. The court found there was good cause to shorten the notice period for that motion, and the prosecution announced it was prepared to argue against suppression.

Two witnesses testified for the prosecution regarding the April 2017 incident: an arresting officer and the same criminalist

who tested evidence from the May incident. The facts established by the testimony are as follows.

Around 10 p.m. on April 17, 2017, La Verne Police Officer Daniel Carrasco and his partner, Officer Flores, were dispatched to the area of Foothill Boulevard and D Street after an anonymous caller reported a "possible domestic violence dispute" involving a male suspect in that area. When asked whether Officer Carrasco saw anyone in the vicinity "that matched the description of the male suspect," the officer testified his partner did. According to Officer Carrasco, Officer Flores observed defendant and a woman "appear[ing] to be in a verbal argument." Officer Flores asked defendant and the woman—defendant's girlfriend, who was later identified as Christine Griffin (Griffin)[10]—to sit on the curb, and Officer Carrasco questioned them individually. Defendant informed Officer Carrasco "he was on probation which included search terms." Officer Carrasco had interacted with defendant in the past, knew he was a "habitual drug user," and had previously seen him on drugs. Defendant appeared to be "under the influence of a narcotic" when Officer Carrasco spoke to him.

Officer Carrasco then spoke to Griffin, who did not appear to be under the influence. Griffin was carrying two bags and said they contained both her and defendant's belongings. She and defendant both consented to a search of the bags. Officer Carrasco found within them "a spoon, . . . approximately ten

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[10] Griffin initially gave the police a false name.

syringes and a small amount of heroin." Defendant and Griffin both said the drugs and paraphernalia belonged to defendant.[11]

After the close of the evidence during the trial court hearing, the prosecution argued the anonymous tip about potential domestic violence demonstrated that the officers' investigation of defendant was supported by reasonable suspicion. The prosecution further emphasized (1) officers searched Griffin's bags only after defendant informed them he was on probation, and (2) defendant admitted to the officers that the heroin and needles found in Griffin's bags belonged to him.

In his argument to the court, defendant conceded he "consented to a search" and he maintained he only wanted to suppress his statement admitting ownership of the heroin—on the ground he never received any *Miranda* advisement despite the fact that police told him to sit on the curb and refused to let him leave when he asked. The prosecution responded that defendant had not brought an appropriate motion to suppress his statement as a violation of *Miranda*—which related to a different constitutional amendment than defendant's challenge to the search and seizure. The prosecution further argued that even if defendant's statement were excluded, there was still sufficient evidence (his appearing to be under the influence of narcotics and Griffin's statement that the drugs belonged to him) to establish he possessed the drugs.

The trial court denied defendant's motion to suppress, finding the officers had probable cause, as well as consent, to

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[11] During the hearing, defendant maintained the opposite, i.e., the drugs and paraphernalia in Griffin's bag belonged to her, not him, and that he did not use heroin.

search Griffin's bags. The court found defendant's conduct violated the terms of his probation because he admitted possessing heroin and drug paraphernalia and showed objective symptoms of being under the influence.[12] In light of the probation violation findings in both the April and May matters, the prosecution moved to dismiss the misdemeanor charges arising from the April incident, and the trial court granted the motion.

4. Sentencing

Defendant argued the trial court should reinstate probation on the additional condition that he attend a 12- or 14-month lock-down drug rehabilitation program to which he had already been accepted. Defendant admitted he was addicted to methamphetamine and said his past attempts at sobriety—which never included participation in a program—always failed. Defendant was 38 years old, had been using methamphetamine since he was a child, and was the primary caregiver for two of his seven children. He said he "took the blame" for the earlier conviction that resulted in his probationary sentence and he emphasized prior to the year at hand he had not been convicted of a crime for more than a dozen years.

The prosecution stated it "sympathize[d] with [defendant's] situation" but asserted he had "squandered" his probation

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[12] The trial court concluded defendant's *Miranda* argument was meritless because *Miranda's* exclusionary rule does not apply to probation revocation hearings (*People v. Racklin* (2011) 195 Cal.App.4th 872). The court further found, in any event, that defendant was not in custody at the time he made the challenged statement. Defendant does not challenge the court's *Miranda* ruling on appeal.

opportunity by "not follow[ing] through with . . . his part of the deal." The prosecution observed defendant was associating with drug users soon after being granted probation and argued he was "not entitled to a program" under the circumstances.

The trial court acknowledged it had discretion to reinstate probation but declined to do so based on its findings that defendant violated the terms of his probation through "two incidents so close in time to [his] grant of probation," with one of those incidents—that in May—involving "the same type of conduct" for which defendant received his probationary sentence. The court said it was "really sympathetic" and could see defendant was "sincere" and felt "remorse," but the court ruled it would execute the previously suspended sentence of seven years, eight months.

II. DISCUSSION

Defendant contends his probationary status did not justify admitting the evidence offered against him because (1) police conduct preceding knowledge of his probationary status violated his right to be free from unreasonable searches and seizures, and (2) upon learning defendant was on probation, police had no knowledge of his specific search conditions. These contentions do not warrant reversal.

With respect to the April 2017 incident, officers acted lawfully prior to learning of defendant's probationary status because the anonymous tip about potential domestic violence was sufficiently corroborated to support defendant's detention and questioning. The officers acted lawfully after defendant disclosed he was on probation because defendant admitted his probation

included "search terms" and he and Griffin expressly consented to a search of her bags.

As to the May 2017 incident, Officer Drake acted lawfully when he stopped Gutierrez's vehicle on the basis of Vehicle Code violations and asked both Gutierrez and defendant to step out of the car. Even if the prosecution did not elicit testimony that would firmly establish Officer Drake had grounds to search Gutierrez's vehicle and defendant's phone, the officer's conduct was not so egregious as to shock the conscience.

Because the trial court properly found defendant violated probation on two occasions and took into account appropriate considerations when determining what sentence to impose, the court did not abuse its discretion when it declined to afford defendant another opportunity at probation.

A. Principles Applicable to Suppression of Evidence in Probation Revocation Proceedings

In 1982, voters added a provision to the California Constitution that reads, as pertinent to this case: "Right to Truth-In-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings . . . ." (Cal. Const., art. I, § 28, subd. (f), par. (2) (hereafter, Truth-In-Evidence provision); *In re Lance W.* (1985) 37 Cal.3d 873, 879 (*Lance W.*).) Our Supreme Court has interpreted the Truth-In-Evidence provision as having "abrogated . . . a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal, Constitution." (*Lance W.*, *supra*, at p. 879.) Thus, unless an

enumerated statutory exception applies (none does in this case), "relevant, but unlawfully obtained evidence" may only be excluded from a criminal proceeding if required by the Fourth Amendment to the United States Constitution. (*Id.* at pp. 888-890.)

The Fourth Amendment prohibits the government from subjecting its citizens to "unreasonable searches and seizures . . . ." (U.S. Const., 4th Amend.) "The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands," however. (*United States v. Leon* (1984) 468 U.S. 897, 906 (*Leon*).) The exclusionary rule is "'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' [Citation.]" (*Ibid.*) "Whether the exclusion sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' [Citation.]" (*Ibid.*) With respect to the former issue, "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' [Citations.]" (*Id.* at p. 908.)

The Fourth Amendment does not require application of the exclusionary rule to probation revocation proceedings. (*People v. Harrison* (1988) 199 Cal.App.3d 803, 810-811, citing *Leon*, *supra*, 468 U.S. 897; see also *Pennsylvania Bd. of Probation and Parole v. Scott* (1998) 524 U.S. 357, 362-369 [minimal deterrent effect of applying exclusionary rule to parole revocation hearings outweighed by costs]; *People v. Nixon* (1982) 131 Cal.App.3d 687, 691-692 [same with respect to probation revocation hearings]

(*Nixon*).) This does not mean all illegally seized evidence, no matter the circumstances, may be used against a defendant in a probation revocation hearing.

It does mean, however, that in order to warrant suppression of evidence in violation of the federal Constitution—the only basis for suppressing evidence under the Truth-In-Evidence provision—a probation revocation defendant must demonstrate "'the police conduct in effectuating the search was so egregious as to offend "the 'traditions and [collective] conscience of our people'" [citations omitted] or to "shock the conscience." [Citation omitted.]' [Citations.]" (*People v. Howard* (1984) 162 Cal.App.3d 8, 21-22 (*Howard*); see also *People v. Lazlo* (2012) 206 Cal.App.4th 1063, 1070 ["the lower federal and California courts have specifically held that the exclusionary rule does not apply in probation revocation hearings, unless the police conduct at issue shocks the conscience"] (*Lazlo*).) Merely establishing a Fourth Amendment violation does not amount to showing the relevant police conduct shocks the conscience. (See *Lazlo*, *supra*, at p. 1072 [police conduct warranting suppression of evidence in support of criminal charges was not egregious enough to warrant suppression of that same evidence at probation revocation hearing]; *Nixon*, *supra*, 131 Cal.App.3d at pp. 690, 693-694 [conduct that might merit suppression under exclusionary rule "did not offend 'a sense of justice'" requiring exclusion from probation revocation hearing].)

Pursuant to Penal Code section 1538.5, a defendant may move to suppress evidence obtained through a warrantless search or seizure by filing a written motion identifying why the search or seizure was unreasonable. (Pen. Code, § 1538.5, subd. (a)(1)(A), (2).) Such motions are subject to the limitations of the Truth-In-

Evidence provision. (*Lance W.*, *supra*, 37 Cal.3d at p. 896 ["although [Penal Code] section 1538.5 continues to provide the exclusive procedure by which a defendant may seek suppression of evidence obtained in a search or seizure that violates 'state constitutional standards,' a court may exclude the evidence on that basis only if exclusion is also mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment"]).[13]

"A warrantless search is presumptively unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search." (*People v. Simon* (2016) 1 Cal.5th 98, 120.) A probation condition subjecting the probationer to warrantless searches at any time provides an obvious exception to the warrant requirement, provided the officer conducting the search "know[s] of that [search] condition when he acts" and "the search is not undertaken for harassment or for arbitrary or capricious reasons or in an unreasonable manner." (*People v. Durant* (2012) 205 Cal.App.4th 57, 64; see also *People v. Bravo* (1987) 43 Cal.3d 600, 605, 610 ["A search conducted pursuant to a valid consent does not violate the Fourth Amendment unless the search exceeds the scope of the consent" or the search is "undertaken for harassment or . . . for arbitrary or capricious reasons"]; *People v. Douglas* (2015) 240 Cal.App.4th 855, 862

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[13] In this case, the trial court treated defendant's Penal Code section 1538.5 motion as a motion to suppress evidence pursuant to exclusionary rule principles only and proceeded as though no such written motion was required for the court to review the evidence under a "shocks the conscience" standard. The People did not—and do not on appeal—fault the trial court's approach.

[without knowledge an individual is on probation prior to search, the search cannot be justified as a probation search "for the officer does not act pursuant to the search condition"] (*Douglas*).)

"[O]ur review of issues related to the suppression of evidence derived from police searches and seizures is governed by federal constitutional standards." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1291.) "'In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. Whether the relevant law applies to the facts is a mixed question of law and fact that is subject to independent review.' [Citation.]" (*People v. Casares* (2016) 62 Cal.4th 808, 835.)

B. The Drug-Related Evidence Was Properly Admitted

1. Police had reasonable suspicion to detain defendant during the April incident

Defendant contends the police had no basis for detaining him in April 2017 and that the subsequent fruits of that detention—the heroin and drug paraphernalia found in Griffin's bags—should have accordingly been excluded. Defendant also argues that general exclusionary principles, and not the more stringent "shocks the conscience" standard, should govern our review of the issue.

Considering defendant's statement in the trial court that he wished only to suppress his statement admitting ownership of the drugs pursuant to *Miranda* and was "not really worried about the search and seizure," there is a strong argument that

defendant forfeited the appellate challenge he now makes to the trial court's refusal to suppress the physical evidence obtained by the police during the April 2017 incident. Nevertheless, we will discuss the merits of the issue because the trial court decided the same.

"The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.'" (*People v. Souza* (1994) 9 Cal.4th 224, 229 (*Souza*), quoting *Terry v. Ohio* (1968) 392 U.S. 1, 19 & fn. 16 (*Terry*) and *United States v. Sharpe* (1985) 470 U.S. 675, 682.) "A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away." (*Souza*, *supra*, at p. 229, quoting *Terry*, *supra*, at p. 19, fn. 16.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza*, *supra*, at p. 231.)

Assuming without deciding that defendant was detained when police instructed him to sit on the curb and he complied, we conclude the detention was reasonable. A police officer may detain a suspect based on an anonymous tip provided the circumstances establish "'sufficient indicia of reliability to provide reasonable suspicion,'" such as independent corroboration of the tip. (*Florida v. J.L.* (2000) 529 U.S. 266, 270 (*J.L.*), quoting *Alabama v. White* (1990) 496 U.S. 325, 327; see also *People v. Dolly* (2007) 40 Cal.4th 458, 470-471 [what constitutes sufficient reliability depends on the totality of the circumstances].)

Here, the prosecution elicited testimony that defendant matched the description of the person described in the anonymous tip, was located in the area described in the tip, and was seen arguing with Griffin by Officer Flores. Defendant's detention for suspected domestic violence was reasonable under those circumstances. (*People v. Ramirez* (1996) 41 Cal.App.4th 1608, 1617 [anonymous tip may be corroborated by police officer's personal observations].) Once Officer Carrasco observed defendant appeared to be on drugs—and having personal knowledge of defendant's drug use—the officers had further reason to detain him. In addition, "the intrusion was brief and minimal, and the contraband which was later discovered was the product of a voluntary consent."[14] (*Id.* at p. 1620; see also *People v. Woods* (1999) 21 Cal.4th 668, 675 ["It long has been settled that a consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary"].)

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[14] Because we conclude officers acted lawfully in detaining defendant, we need not address his contention that ordinary exclusionary rules—rather than the "shocks the conscience" standard—should apply. We note, however, that evidence of the April 2017 incident was ultimately presented only in support of a probation violation allegation and not as a basis for adjudicating defendant guilty of the substantive misdemeanor charges.

2. Police conduct during the May incident did not shock the conscience[15]

Defendant does not dispute Officer Drake had a sufficient basis to stop Gutierrez's car because of the observed Vehicle Code violations, but he contends the officer had no basis to expand the scope of his investigation beyond a typical vehicle stop and should have ended the stop after reviewing Gutierrez's identification. Defendant also contends the search was not justified by his probationary status because the officer did not know the precise terms of defendant's probation—i.e., what the search conditions, if any, allowed.

A police officer who stops a vehicle after observing a Vehicle Code violation may "as a matter of course" order the driver and any passengers to step out of the vehicle "pending completion of the stop." (*Maryland v. Wilson* (1997) 519 U.S. 408, 410, 415.) Accordingly, Officer Drake did not act unlawfully when he instructed defendant to exit the car.

Defendant, on the other hand, makes a colorable argument that the evidence does not establish Officer Drake had a lawful basis to search Gutierrez's vehicle following the traffic stop. Police may not search a vehicle simply on the basis of a standard

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[15] The Attorney General contends defendant forfeited arguments challenging the vehicle search insofar as it was based on the anonymous tip because defendant failed to challenge the reasonableness of the search on that basis in the trial court. We conclude defendant's assertions in the trial court were sufficiently specific "to give the prosecution and [trial] court reasonable notice" of his objection. (*People v. Williams* (1999) 20 Cal.4th 119, 130-131 [level of specificity required depends on "the legal issue the defendant is raising and the surrounding circumstances"].)

traffic violation for which the driver is not arrested. (*Knowles v. Iowa* (1998) 525 U.S. 113.) Vehicle searches incident to arrest *are* permitted "if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest" (*Gant*, *supra*, 556 U.S. at p. 351), but there is no evidence police arrested Gutierrez or defendant before conducting a search. The police may also conduct a vehicle search based on a passenger's probation search conditions if the search is "'confined to those areas of the passenger compartment where the officer reasonably expects that the [probationer] could have stowed personal belongings or discarded items when aware of police activity.'" (*People v. Cervantes* (2017) 11 Cal.App.5th 860, 871, quoting *People v. Schmitz* (2012) 55 Cal.4th 909, 926 [applying same holding with regard to parolee passengers].) But, as we explain, the record does not clearly establish Officer Drake knew defendant was subject to probation conditions that authorized the searches in question.[16]

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[16] Officer Drake testified he conducted the vehicle search based on the anonymous tip received about a suspicious man and woman casing the area. "If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*[(1982) 456 U.S. 798, 820-821 (*Ross*)] authorizes a search of any area of the vehicle in which the evidence might be found." (*Gant*, *supra*, 556 U.S. at p. 347.) Here, the prosecution did not meet the probable cause standard because it did not present evidence showing the anonymous tip was reliable. (*Ross*, *supra*, at p. 809 [probable cause to support warrantless vehicle search is established only if "based on facts that would justify the issuance of a warrant"]; *People v. Lissauer* (1985) 169 Cal.App.3d 413, 421 [*Illinois v. Gates* (1983) 462 U.S. 213 requires sufficient

Defendant contends that because warrantless probation searches are based on consent, such searches are lawful only where the officer conducting the search knows the precise parameters of the search permitted—i.e., the specific search conditions defendant consented to in accepting probation. (See, e.g., *People v. Romeo* (2015) 240 Cal.App.4th 931, 950 ["Unlike the parole context, where the scope of permissible search is imposed by law—and deemed known to the searching officer from nothing more than the fact that someone is on parole—a probationer's expectation of privacy, and hence the reasonableness of a warrantless search, may vary depending on the scope of advance consent"], footnote omitted (*Romeo*).) Accordingly, defendant asserts that even if Officer Drake searched his phone (or Gutierrez's vehicle) after learning defendant was on probation, the officer had no knowledge whether defendant's probation encompassed consent to those searches.[17]

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corroboration of "untested informant's tip to provide probable cause" for vehicle search].)

[17] Probation conditions allowing searches of cell phones and electronic data are typically imposed separately from the standard "person and property" search condition. (See, e.g., *In re I.V.* (2017) 11 Cal.App.5th 249, 261-262 ["probation conditions authorizing searches of a probationer's person, property, and vehicle," which "are 'routinely imposed,'" do not inherently include searches of electronic data]; see also *Riley v. California* (2014) 573 U.S. ___ (134 S.Ct. 2473, 2491) [distinguishing cell phone searches from residence searches on the ground the former "would typically expose [private information] . . . far *more* than the most exhaustive search of a house"]; but see *People v. Sandee* (2017) 15 Cal.App.5th 294, 302 [reasonable for police officer to

While there are cases with language that can be marshaled to support defendant's position, such as *Romeo*, *supra*, 240 Cal.App.4th 931, none of those cases addresses the precise circumstances before us—where the defendant's probation conditions were actually consistent with the search conducted and the searching officer was aware the defendant was subject to search conditions but did not know the particulars of those conditions.

In *Douglas*, *supra*, 240 Cal.App.4th at p. 863, the Court of Appeal stated that "in the case of probation searches, the officer must have some knowledge not just of the fact someone is on probation, but of the existence of a search clause broad enough to justify the search at issue." The *Douglas* court did not apply that rule to the case before it, however, because the defendant in *Douglas* was subject to postrelease community supervision which, being similar to parole, subjected him to a mandatory search condition. (*Id.* at p. 864.)

In *People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180 (*Hoeninghaus*), the appellate court stated that because "a probation condition . . . defines the scope of consent and sets the parameters of a proper consent search," police officers who conduct a search "unaware of the condition . . . cannot know that a probationer has given advance consent and therefore cannot claim to be conducting a probation or consent search." (*Id.* at p. 1194.) Unlike this case, however, the officer who performed the

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believe that condition allowing search of probationer's "'property'" and "'personal effects'" included search of probationer's cell phone].) In defendant's case, an "electronic information" search condition was separately imposed in open court.

search in *Hoeninghaus* did so without knowing the defendant was on probation, much less subject to any search conditions. (*Id.* at p. 1185.) Thus, the *Hoeninghaus* court did not address the issue before us.

In *Romeo*, *supra*, 240 Cal.App.4th at pp. 951-952, the Court of Appeal stated that because probation search terms vary in scope, "mere knowledge that someone is on probation and subject to search, without more, may be insufficient where there is a challenge to the search." The critical issue in *Romeo*, however, was not whether the searching officer was aware of the probation condition permitting the search—the *Romeo* court found there was substantial evidence the officer had personal knowledge the probationers were subject to search conditions. (*Id.* at pp. 948-949.) The problem in *Romeo* was that the court could not determine whether the officer's subjective belief that the probationers had consented to the search was objectively reasonable under the circumstances because the prosecution never proffered actual evidence of the operative search clause so as to show it in fact covered the search conducted. (*Id.* at p. 955.) This case is significantly different in that respect from *Romeo* because defendant does not claim the searches of Gutierrez's vehicle and defendant's cell phone may have been outside the scope of his probation conditions and because those conditions were part of the record before the trial court.

We are mindful, however, that a search of digital devices was performed in this case and that probation conditions authorizing such a search (as defendant's in fact did here) are often separately imposed and may require special justification and tailoring. Because it may be particularly important for investigating officers to know the precise contours of such

conditions, we shall assume for argument's sake that defendant has established the search of at least his cell phone was not justified by any exception to the warrant requirement. Defendant nevertheless has not shown the deficiency requires suppressing evidence under the "shocks the conscience" standard—which he concedes applies. We discuss several of the cases applying that standard to illustrate why exclusion is not warranted here.

In *Nixon*, *supra*, 131 Cal.App.3d at p. 690, police stopped the defendant's vehicle because its color "matched a report of a vehicle which had been involved in a burglary." The car's occupants were all subjected to pat-down searches and one was found to have a knife. (*Ibid.*) Another occupant was seen placing something beneath a seat, which the occupant said was beer. (*Ibid.*) Officers searched the vehicle and found nunchakus belonging to the defendant—whom officers did not know was on probation—under the seat. (*Ibid.*) The Court of Appeal held evidence of the nunchakus was properly admitted in the defendant's probation revocation hearing, even though the district attorney conceded application of the exclusionary rule would have merited suppression of that evidence, because the trial court "could properly conclude the police conduct and intrusion did not offend 'a sense of justice' in the constitutional sense." (*Id.* at pp. 690, 693-694; see also *Lazlo*, *supra*, 206 Cal.App.4th at pp. 1066, 1072 [search of the probationer defendant's purse and hotel room was unreasonable under exclusionary rule standards but did not "'shock the conscience"'].)

By contrast, the Court of Appeal's sense of justice *was* offended in *People v. Washington* (1987) 192 Cal.App.3d 1120 (*Washington*). Officers in that case came across a group of five

people in an area where numerous drug arrests had been made in the past. (*Id.* at pp. 1122-1123.) When the officers approached, the group quickly dispersed and the officers followed the defendant, a Black man, who began to run. (*Ibid.*) While running, the defendant dropped a bag containing narcotics and the People sought to revoke his probation for possessing the drugs. (*Ibid.*) But the only reason the testifying officer gave to explain why he pursued the defendant was the officer's agreement with the statement that "most of the Black men he saw in the area usually had something to hide if they ran from police." (*Id.* at p. 1123.) The appeals court concluded singling out a suspect solely on the basis of his race was "an egregious violation of the Fourth Amendment" that "offend[ed] [its] "'sense of justice'"" and merited exclusion of the resulting evidence. (*Id.* at p. 1128, citation omitted; see generally *Rochin v. California* (1952) 342 U.S. 165, 166, 172 [police conduct forcibly opening the defendant's bedroom door, attempting to extract capsules from his mouth, and directing doctors to pump his stomach against his will shocked the conscience] (*Rochin*).)

Absent from the record here is detailed evidence describing why and when Officer Drake searched Gutierrez's vehicle and defendant's cell phone. But the mere absence of that evidence does not render defendant's case more like *Washington* or *Rochin* than like *Nixon* or *Lazlo*. As both *Nixon* and *Lazlo* make clear, the fact that a search or seizure warrants suppression of evidence under exclusionary rule principles does not mean the police conduct in executing that search or seizure shocks the conscience. Here, there is no question that Officer Drake's conduct did not shock the conscience.

Officer Drake testified he relied on the observed Vehicle Code violations to stop Gutierrez's vehicle to investigate the anonymous tip. Although the prosecution did not elicit specific testimony showing how the officer connected defendant to that tip, Officer Drake's testimony does not show, or even suggest, he decided to detain and search defendant and the vehicle because of race, personal animosity, or some other conscience-shocking reason. Nor does the record show that Officer Drake harassed or physically mistreated defendant in any respect.

As in *Nixon*, there is here at least some testimony providing a legitimate reason for initiating the search conducted. Furthermore, and making an even stronger case for the reasonableness of the police conduct here as compared to *Nixon* and *Lazlo*, there was evidence Officer Drake believed the search was consensual because defendant informed him he was on probation. While we cannot be fully certain on the record developed that the officer searched the vehicle or defendant's cell phone only after learning defendant was on probation, that is the logical inference. Similarly, there is good reason to presume Officer Drake believed defendant's disclosure of his probation status amounted to a disclosure that he was subject to some form of search condition. And defendant does not dispute that the search conducted was in fact within the scope of his probation conditions.

In sum, there is no conscience-shocking conduct of the type in *Washington* or *Rochin* here. While the record reveals places where the prosecution would have done better to more fully develop the testimony, that does not warrant reversal. (*Howard*, *supra*, 162 Cal.App.3d at pp. 21-22.)

C. The Court Did Not Abuse Its Discretion in Declining to Reinstate Probation

After concluding a defendant has violated the terms of his or her probation, a trial court has "broad discretion" to select from among several penal sanctions. (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420-1421 (*Bolian*).) The court "may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant" to a jail or prison term. (*Id.* at p. 1420; see also Pen. Code, § 1203.2, subd. (b)(1).) If the court opts to terminate probation, "the sentence the court may impose depends on how the court disposed of the case when it first placed the defendant on probation. . . . [I]f the court originally imposed a sentence and suspended execution of it, upon revocation and termination of probation, the court must order that imposed sentence into effect." (*Bolian*, *supra*, at pp. 1420-1421, italics omitted.) A court's decision not to reinstate probation "'will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' [Citation.] A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909 (*Downey*).)

The trial court in this case recognized it had discretion to reinstate defendant's probation and that, if it chose not to do so, it was obligated to execute the previously pronounced sentence of seven years and eight months in county jail. The record reveals no abuse of discretion in the choice the court made. The court heard from defendant—who spoke of his lack of a criminal record for many years, his family caretaking responsibilities, and his

unsuccessful efforts to overcome a longstanding drug addiction. The court observed defendant was remorseful but ultimately concluded reinstating probation was inappropriate given defendant's "complete[ ] disregard[ ]" for the probation sentence previously granted. The court emphasized defendant violated probation on two separate occasions, both of which occurred very soon after being placed on probation and one of which "involved the same type of conduct" underlying the probationary sentence.

The court's considerations in coming to its decision were proper. (Cal. Rules of Court, rule 4.414 [enumerating criteria to be considered by the court in determining whether to grant or deny probation, which include the recency of prior crimes, the defendant's past performance on probation, the defendant's willingness and ability to comply with probation, the effect of imprisonment on the defendant's dependents, and the defendant's remorse]; *Downey*, *supra*, 82 Cal.App.4th at p. 910 [recognizing the court "'has considered all facts bearing on the offense and the defendant to be sentenced'" and concluding there was no abuse of discretion].) Insofar as defendant's untreated drug addiction may have contributed to his probation violations, that fact does not compel reinstatement of probation. (See *People v. Noyan* (2014) 232 Cal.App.4th 657, 661-663 [court did not abuse its discretion in declining to reinstate probation where the defendant's prior crimes and probation violations largely arose from his drug addiction]; *People v. Stuckey* (2009) 175 Cal.App.4th 898, 916 [court had discretion not to reinstate probation where the defendant's drug addiction rendered him "unlikely to succeed on probation"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

JASKOL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.